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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/783,093	02/23/2004	Mordecai Dunst	1954-393	3524
6449 7590 03/17/2009 ROTHWELL, FIGG, ERNST & MANBECK, P.C. 1425 K STREET, N.W. SUITE 800 WASHINGTON, DC 20005				
EXAMINER KASZTEJNA, MATTHEW JOHN				
ART UNIT 3739		PAPER NUMBER		
NOTIFICATION DATE 03/17/2009		DELIVERY MODE ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PTO-PAT-Email@rfem.com

Office Action Summary

Application No.

10/783,093

Applicant(s)

DUNST, MORDECAI

Examiner

MATTHEW J. KASZTJEJNA

Art Unit

3739

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 05 January 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-6, 21-34 and 50-52 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-6, 21-34 and 50-52 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 23 February 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on January 5, 2009 has been entered.

Notice of Amendment

In response to the amendment filed on December 4, 2008, amended claim 1 and new claims 50-52 are acknowledged. The following new and reiterated grounds of rejection are set forth:

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claim 1-6, 21-25 and 50-52 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Newly added amendment states "said blade being substantially flat and thin", however the blade 20 shown in Figures 1-3

is clearly shown as being curved. Thus, the blade cannot be both substantially flat and curved at the same time. Further evidence regarding a curved blade is stated in claim 3, which states the blade is curved.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-6, 21-25 and 50-52 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term "substantially" in claim 1 is a relative term which renders the claim indefinite. The term "substantially" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. Furthermore, the phrase states the blade is "substantially flat" and yet the blade is shown to be curved in all of the Figures and it stated as being curved in claim 3. It is unclear how the blade can be both flat and curved.

Claims 2-6, 21-25 and 50-52 are rejected as being dependent from claim 1.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-2, 4, 6, 21-28, 30-34 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 2,911,968 to Schueler et al.

In regards to claims 1 and 27, Schueler et al. disclose a blade assembly for a laryngoscope including a handle 1, the blade assembly comprising; base 2 for coupling to the handle; an elongated blade 3 secured to the base, the elongated blade having a proximal end, a distal end, an upper surfaces and a lower surface, the lower surface of the elongated blade being secured to the base at the proximal end, the blade being *substantially* flat and thin; a first guide tube 7 (or 48) affixed to the elongated blade and having a proximal end and a distal end; and a second guide tube 52 affixed to the elongated blade adjacent the first guide tube and having a proximal end and a distal end, the first and second guide tubes being constructed and arranged to direct tubes extended therethrough into the oral cavity of a patient (see Figs. 1-3).

In regards to claims 2 and 28, Schueler et al. discloses a blade assembly for a laryngoscope, wherein the first guide tube 7 is substantially straight along its entire length and the second guide tube is curved 52 (see Fig. 1).

In regards to claim 4, Schueler et al. discloses assembly for a laryngoscope, further comprising a light attached to the elongated blade (see Col. 2, Lines 40-65).

In regards to claims 6 and 34, Schueler et al. discloses a blade assembly for a laryngoscope, wherein the first and second guide tubes are oriented at different angles of attack 53, 50 with respect to the elongated blade so that when the elongated blade is placed atop the tongue of a patient to effect laryngeal suspension, the first end second

guide tubes direct respective tubes extended therethrough into different regions of the patient's oral cavity (see Col. 4, Lines 21-35).

In regards to claims 21 and 30, Schueler et al. discloses a blade assembly for a laryngoscope, wherein the proximal end of the first guide tube and the proximal end of the second guide tube are both positioned at the proximal end of the elongated blade (see Figs. 1-2).

In regards to claims 22-24 and 31-32, Schueler et al. discloses a blade assembly for a laryngoscope, wherein the distal end of the guide tube and the distal end of the second guide tube are positioned at about the midpoint of the elongated blade (See Fig. 1).

In regards to claims 25-26 and 33, Schueler et al. discloses a blade assembly for a laryngoscope, further comprising a first aspiration tube inserted into the first guide tube and a second aspiration tube inserted into the second guide tube (see Col. 4, Lines 21-35).

Claims 1, 21, 25-26, 27, 30, 33 and 50-52 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 4,256,099 to Dryden.

In regards to claims 1 and 27, Dryden discloses a blade assembly for a laryngoscope including a handle, the blade assembly comprising; base 68, 69 for coupling to the handle 79 (see Fig. 6); an elongated blade 64 secured to the base, the elongated blade having a proximal end, a distal end, an upper surfaces and a lower surface, the lower surface of the elongated blade being secured to the base at the proximal end, the blade being *substantially* flat and thin (see Fig. 8); a first guide tube

62 affixed to the elongated blade and having a proximal end and a distal end; and a second guide tube 63 affixed to the elongated blade adjacent the first guide tube and having a proximal end and a distal end, the first and second guide tubes being constructed and arranged to direct tubes 11 and 12 extended therethrough into the oral cavity of a patient (see Col. 4, Lines 40-57).

In regards to claims 21 and 30, Dryden discloses a blade assembly for a laryngoscope, wherein the proximal end of the first guide tube and the proximal end of the second guide tube are both positioned at the proximal end of the elongated blade (see Figs. 4-8).

In regards to claims 25-26 and 33, Dryden discloses a blade assembly for a laryngoscope, further comprising a first aspiration tube inserted into the first guide tube and a second aspiration tube inserted into the second guide tube (see Col. 4, Lines 21-35).

In regards to claim 50, Dryden discloses a blade assembly for a laryngoscope, wherein said blade does not have an opening at its distal end (see Figs. 5 and 7-8).

In regards to claim 51, Dryden discloses a blade assembly for a laryngoscope, wherein said blade is not hollow (see Figs. 5 and 7-8).

In regards to claim 52, Dryden discloses a blade assembly for a laryngoscope,, wherein said blade is not in the form of a tube (see Figs. 5 and 7-8).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 5, 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 2,911,968 to Schueler et al. in view of U.S. Patent No. 6,248,061 to Cook, Jr.

In regards to claims 5 and 29, Schueler et al. disclose a blade assembly for a laryngoscope including a handle 1, the blade assembly comprising; base for coupling to the handle; an elongated blade 3 secured to the base, the elongated blade having a proximal end, a distal end, an upper surfaces and a lower surface, the lower surface of the elongated blade being secured to the base at the proximal end; a first guide tube 7 (or 48) affixed to the elongated blade and having a proximal end and a distal end; and a second guide tube 52 affixed to the elongated blade adjacent the first guide tube and having a proximal end and a distal end, the first and second guide tubes being constructed and arranged to direct tubes extended therethrough into the oral cavity of a patient (see Figs. 1-3) but is silent with respect to the elongated blade being curved. Cook, Jr. teach of an analogous laryngoscope blade 60 having a curved blade portion 62, a proximal end 66 and a distal end 64 and a base portion 74 to connect to a handle 26 (see Figure 6). Figures 6 and 7 show that the blade portion 62 has an upper surface and a lower surface and that the lower surface is secured to the base portion 74 at the proximal end 66. It would have been obvious to one skilled in the art at the time the

invention was made to curve the elongate blade of Schueler et al. to aid in the placement of the laryngoscope within the airway of a patient as taught by Cook, Jr. and is well known in the art.

Allowable Subject Matter

Claim 3 would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112, 2nd paragraph, set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.

Response to Arguments

Applicant's arguments filed December 4, 2008 have been fully considered but they are not persuasive.

Applicant states that Schueler fails to disclose a blade. Examiner disagrees. Element 3, in the broadest interpretation of the claim, is a blade. Element 3 meets all the structural limitations of the claim in that it clearly has a proximal end, a distal end, an upper surface and a lower surface, the lower surface of the elongated blade being secured to the base at the proximal end. Thus the hollow tube is fully functional as a blade and Schueler meets the limitations of the claims. Applicant further states that the blade of Schueler is not *substantially* flat and thin. Examiner disagrees. The term "substantially" in claim 1 is a relative term which renders the claim indefinite. The term "substantially" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. Furthermore, the phrase states the blade is "substantially flat" and yet the blade is shown to be curved in all of the Figures

and it stated as being curved in claim 3. It is unclear how the blade can be both flat and curved. As broadly as claimed, the blade of Schueler is *substantially* flat and thin.

Applicant states that Schueler fails to disclose a "first guide means for guiding a first aspiration tube". Examiner disagrees. It is noted that the word "for" in the claim may be properly interpreted as "capable of," and "capable of" does not require that reference actually teach the intended use of the element, but merely that the reference does not make it so it is incapable of performing the intended use. The tubes 48 and 51 are fully capable of passing instruments (i.e. suction catheters, as are well known within the art) therethrough. It has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987).

Applicant states that Schueler and Cook fail to disclose a tongue deflector having a portion extending in a direction transverse to the upper surface of the blade. Examiner disagrees. As seen in Figs. 6-7, Cook clearly shows a tongue deflector 68 to which a fin 70 is attached (see Col. 5, Lines 1-10), arranged in an identical fashion to that of the instant invention. As broadly as claimed, the combination of Schueler and Cook meet the limitation of the recited claims.

Furthermore, Applicant's arguments with respect to claims 1-6, 21-26, 33 and 50-52 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MATTHEW J. KASZTEJNA whose telephone number is (571)272-6086. The examiner can normally be reached on Mon-Fri, 8:30-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Linda C.M. Dvorak can be reached on (571) 272-4764. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/M. J. K./
Examiner, Art Unit 3739

3/12/9